

Independent Journalism v. Political Courts: The Cumhuriyet Trial in Turkey and Strasbourg

Bertil Emrah Oder

2019-05-04T08:37:39

Shortly after Turkey's ruling AK party lost control of metropolitan cities in the local elections of April 2019, a crucial verdict of the regional appellate court in a [major case](#) of journalism was brought forth in the national judicial network system. This case is known as the *Cumhuriyet* trial, a reference to the political daily in which the journalists previously served as managers, editors, columnists, cartoonists, or reporters. Through silence, delay, or selective responsiveness, not only the Turkish Constitutional Court but also the European Court of Human Rights (ECtHR) are playing their part in the ongoing demise of Turkey's freedom of the press.

Praised as the [école supérieure](#) of Turkish journalism, *Cumhuriyet* is the oldest newspaper of Turkey's Republican era. It has played a central role in the public debate for more than 95 years with its secular, progressive, and critical publications essential to democratic politics. The verdict means the imprisonment of eight journalists for lending support to terrorism without becoming or being members of a terrorist organization. The journalists were released during proceedings after a long period of pre-trial detentions, but the criminal process has continued. As you are reading this piece, they will be serving the remainder of their 13-month sentences.

The *Cumhuriyet* case has 14 defendants, and the verdict concerns eight who were sentenced to less than five years. Two of them are expected to remain free due to time served as the trial has progressed. Still, the remaining journalists, including the former editor-in-chief, the head of board of directors, and the investigative journalists, are waiting for an appeal before the Court of Cassation. Since they were sentenced to imprisonment for more than five years, their appeal process is subject to another procedure which is currently pending. The newly adopted system of the regional appellate courts serves to push forward the speedy execution of imprisonment for the first group of journalists, while the second group will wait for the decision of the Court of Cassation. The regional appellate court has rejected the petition of the first group of journalists and, as a result, the issue is to be ultimately resolved by the Court of Cassation. However, the verdict of the Court of Cassation on merits will have the final say in the case. An evident injustice will be recorded due to the legal formalism of criminal procedure law if the Court of Cassation rules in favor of the journalists after the first group completes their prison term. The journalists applied to the first instance court for the non-execution of their punishment, but their petition was [rejected](#).

Cumhuriyet: The leading journalism case under constitutional transgression

The *Cumhuriyet* trial is an extremely important journalism case as it raises global concerns regarding the decline of freedom of the press. In fact, President Erdoğan's utterly negative stance against *Cumhuriyet* reached its highest level with the publication of photos on the alleged delivery of arms to Islamist rebels in Syria by Turkish trucks owned by National Intelligence Unit. He personally [filed a case](#) against the responsible journalists. The case resulted in [a criminal conviction](#) against Can Dündar (the editor-in-chief) and Erdem Gül (the newspaper's Ankara representative) of divulging state secrets. [Can Dündar left the country](#) before [the appeal process of his sentence](#) was completed. The *Cumhuriyet* trial has been closely linked with this previous case.

The criminal proceedings in the *Cumhuriyet* trial represent more than the well-known weaknesses of Turkey's judiciary that mostly pertain to irregularities to conduct effective investigation, prolonged proceedings, and interpretative failures. The trial demonstrates the advanced practices controlling independent media, a chilling effect, and judicial arbitrariness under massive constitutional transgression. Strikingly, the case has not been decided on the basis of a typically autocratic and illiberal legal framework or by an underdeveloped judiciary lack of capacity and resources. Current Turkish legislation on the freedom of expression, free press, and journalism has some deficiencies, but it has undergone many changes due to the Europeanisation process, including the adoption of a completely new Press Law and Criminal Code. The efficiency of justice has been enhanced by technological infrastructure, the construction of mega courthouses, and national reform schemes implemented by EU grants. The EU, Council of Europe, and other international funds have supported the training of judges and prosecutors in the field of human rights extensively and generously. Compared to a judicial setting of entrenched autocracies that try journalists, the Turkish case of *Cumhuriyet* was conducted through a legal system and by a judiciary that was supposed to be well equipped in terms of resources and skills (legal basis, impartiality, infrastructure, and knowledge). We could have expected a pro-journalism outcome from such a judiciary, in line with the interpretative principles of constitutional and criminal law, despite the deficiencies of Turkish democracy and current legislation. However, it has become a beacon of judicial retrogression in the face of all reforms and, particularly, in terms of EU investment. According to recent data from the Syndicate of Turkish Journalists, there are [142 journalists](#) and media workers in detention in Turkey as of May 2019.

Post-truth judging against independent journalism

Regarding the substantive part of the judicial process, the argumentative performance of political judiciary seems to be at its worst. The journalists were primarily convicted of lending support to three terror organizations of vastly different stripes without being members of these groups. These terrorist organizations are the extreme leftist DHKP-C, the Kurdish PKK, and the Fethullahist Terrorist Organization (FETÖ), which is led by the Islamic cleric Fethullah Gülen, known as the mastermind

of the failed coup attempt of 2016. Gülen's community and its infiltration into the state's bureaucracy have been a matter of concern for many years in *Cumhuriyet's* publications, but Gülen was the societal and political ally of the ruling AK party for a long period.

The entire process of the *Cumhuriyet* trial has shown the decline of rationality and the rise of illusions in the judging that [lacks accurate and evidence-based argumentation](#). Both the indictment and the verdict of the first instance court are based on pseudo evidences. This leads to a post-truth judging that blurs the line between fact and fiction. Regular news and columns, including direct political criticism published before the coup attempt in 2016, have been treated as evidence for the support of terrorism. *Cumhuriyet's* general criticism before and after the coup attempt against the illiberal practices of the government towards different segments of society was interpreted as a conspiracy and as supporting terrorism. Even though *Cumhuriyet* has always been a secular daily that even suffered from Islamic terrorist attacks and religiously motivated hate speech, its editorial policy was thought to have changed in an inclusionary manner, particularly in its support of the Islamic terrorist group FETÖ. One senior investigative journalist, who has published critiques of the mastermind behind the coup attempt, Fethullah Gülen, for 30 years and who has received many threats from fundamentalist groups, had to prove that he does not support a religiously motivated FETÖ but a democratic society free from oppression. There were also hearings that included an introductory course on independent journalism. It had to be explained to the court how an editorial board determines its headlines as daily practice and what a publication consultant is and does. Telephone calls for ordering meals or [holiday bookings](#) have been regarded as evidence since the restaurant and the travel agency were on a list of FETÖ supporters provided by the intelligence service. The fact that the owner of the relevant travel agency now serves as the Minister of Tourism is still puzzling. Furthermore, the prosecutor who initiated the investigation against the journalists was scandalously accused of being a FETÖ member who had infiltrated the judiciary. He was not removed from office during the preparation process of the indictment and contributed to it committedly. The witnesses in the trial were either seeking revenge or had personal conflicts with the accused journalists or pro-government journalists.

Depicted with the features of highly politicized trials, the *Cumhuriyet* trial is not only a clear violation of the freedom of the press regarding both individual and institutional aspects of independent journalism. The principle of legality, the guarantees related to the right to a fair trial including a pertinent and sufficient reasoning, the right to effective legal remedies, and the presumption of innocence are other fundamental rights at stake. Significantly, the trial may enrich the portfolio of the worst practices on the misuse of state power by restricting fundamental rights that "ulterior purpose doctrine" with its direct and circumstantial evidence can be applied (for comparison see ECtHR, [Ilgar Mammadov v. Azerbaijan](#), paras. 133-144). Absurd and irrelevant evidence, irrational and unconvincing judicial inferences, and political circumstances surrounding the case may reveal the misuse of state power as a pattern, prohibited by both the Turkish Constitution (Article 14) and the European Convention of Human Rights (Article 18).

Daily-packing: Managerial change in Cumhuriyet

The international media focused on the criminal hearings of the *Cumhuriyet* journalists. Yet, there was another parallel trial before the civil court regarding the election of the board of directors of the *Cumhuriyet* Foundation, the owner of the daily. This was a deliberate intervention into the institutional autonomy of the newspaper through the use of civil law initiated by a complaint from a group whose members were previously part of the board of directors. This group was also known for its hostile expressions against the convicted journalists and their editorial preferences. The prosecutors used this case as evidence for criminal investigation by claiming that the *Cumhuriyet Foundation* was taken over in a fraudulent manner and that its editorial policy was changed by the convicted journalists. While the criminal trials were still ongoing, the accused journalists lost the case before the civil court. The proceedings before the civil court had taken a turn when the General Directorate for Foundations [changed its initial interpretation](#) supporting the journalists' arguments. This happened after the submission of an anonymous petition to the office of President Erdoğan which demanded the managerial transfer of the daily to the losers of the board elections. Consequently, the accused journalists surrendered managerial control. This shakeup in the board of editors has caused resignations and eliminated the convicted journalists from the daily. It has also been perceived as a [hijacking by the government](#) through the use of formal law that recalls the packing strategies applied to the judiciary by right-wing populist governments.

The Constitutional Court and the European Court of Human Rights: judicial silence and selectiveness

The judicial politics of the Constitutional Court and the European Court of Human Rights (ECtHR) regarding the applications of the *Cumhuriyet* journalists still fuel illiberal stances against independent journalism. This causes the victimization of journalists. Both courts have applied a silence, delay, or selective responsiveness as a judicial strategy for the *Cumhuriyet* applications. This runs counter to the ECtHR's understanding about the pre-eminent role of the press in a state governed by the rule of law which has even been replicated by Turkey's Constitutional Court, particularly in individual applications since 2012 (see e.g. [Erdem Gül ve Can Dündar Ba#vurusu](#), Applic. No.: 2015/18567, 25 February 2015; [#ahin Alpay \(2\) Ba#vurusu](#), Applic. No.: 2018/3007, 15 March 2018).

The journalists applied to the Constitutional Court on 26 December 2016 and to the ECtHR on 2 March 2017. On 11 January 2018, the Constitutional Court responded to one journalist (see [Turhan Günay Ba#vurusu](#), Applic. No.: 2016/50972, 11 January 2018) and [upheld](#) the violation of his personal freedom. In the course of these events, there has been a wait-and-see approach from the ECtHR. It communicated the application of ten journalists in *Murat Sabuncu and the others v. Turkey* as a priority case and invited the Turkish government to submit its observations. [Due to the failure of the government](#) to do so, the ECtHR provided two extensions of time limits for the submissions till the end of 2017. However, it did not conclude this application, despite the long pre-trial detentions and the

ineffectiveness of the Constitutional Court. The journalists who surrendered to serve the remainder of their punishment last week have again applied to the Constitutional Court for the non-execution of their imprisonment. Their petition has not yet been addressed. Instead, the Constitutional Court decided on 3 May on the previous pre-trial detentions of a group of leading journalists in the *Cumhuriyet* trial. In fact, this application was the one submitted on 26 December 2016. After 2 years and 5 months, the Court [has come to the conclusion](#) that four of the journalists did not suffer any violation of their rights. The Court's majority ruling (9 to 6) is a U-turn in its own case law, praising freedom of the press and applying the chilling effect doctrine (see for details [Erdem Gül ve Can Dündar Ba#vurusu](#), Applic. No.: 2015/18567, 25 February 2015).

The slow and tactical approach of the Constitutional Court and the ECtHR in the face of flagrant violations of the freedom of press such as those found in the *Cumhuriyet* trial points to an emerging pattern of judicial avoidance by using case management and prioritization strategies. After a period of delay, the Constitutional Court has become clearly submissive to the offending practices in the recent ruling on the *Cumhuriyet* journalists. This sacrifices independent journalism to the arbitrariness of autocratic populism. It remains to be seen whether the Court applies a pro-journalism approach as a strategy of judicial selectiveness for other journalism cases pending before it. Moreover, the ECtHR's silence undermines the very essence of the chilling effect doctrine. Its delayed libertarianism may secure its recognition by illiberal regimes in the long term but will ultimately lead to a discussion on a new form of sham judicial review.

I thank attorneys of the Cumhuriyet journalists, particularly Fikret #lkiz, who provided the expertise that assisted this blog article. I refer here also to my own observations during the proceedings besides the verdict and media reports. I was allowed to attend the proceedings as the family member of a senior investigative journalist, my father Hikmet Çetinkaya.

